82-2138

JLS/la/S

Case No.
IN THE SUPREME COURT
TERM: October 1, 1982

GERALD B. WOLFGRAM Next Friend of DANIEL WOLFGRAM, FAYE I. WOLFGRAM, GERALD B. WOLFGRAM, jointly and severally,

Plaintiff-Appellants,

vs

BOMBARDIER LIMITED,

Defendant-Appellee.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX FOR WRIT OF CERTIORARI

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No. 81-1117

United States Court of Appeals

For the Sixth Circuit

GERALD WOLFGRAM, Plaintiff-Appellant, vs BOMBARDIER LTD., ET AL., Defendants-Appellees.	ORDER

BEFORE: JONES and KRUPANSKY, Circuit Judges, and TIMBERS, Senior Circuit Judge*

Presently before the panel is a petition for rehearing. Upon due consideration, said petition is hereby DENIED.

JONES, Circuit Judge, dissenting.

I dissent from the majority's denial of the petition for rehearing for the reasons set forth in the previously filed opinion on the merits.

ENTERED BY ORDER OF THE COURT

/S/ JOHN P. HEHMAN, Clerk

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*Hon. William H. Timbers, United States Court of Appeals for the Second Circuit, sitting by designation.

No. 81-1117

THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GERALD WOLFGRAM, et al., Plaintiffs-Appellants	
vs	ORDER
BOMBARDIER LIMITED, et al., Defendants-Appellees	

BEFORE: JONES, KRUPANSKY and TIMBERS,*[1] Circuit Judges

Plaintiff Gerald Wolfgram (Wolfgram) appeals a judgment of "no cause of action" entered upon a jury verdict for defendant Bombardier Limited (Bombardier) in this diversity products-liability action. Wolfgram and several friends had been snowmobiling one evening when a Ski-doo snowmobile manufactured by defendant Bombardier and owned by Randall Larson developed mechanical difficulties: the engine was not delivering power to the track. With the engine

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1*Hon. William H. Timbers, United States Court of Appeals for the Second Circuit, sitting by designation.

running, the cowling which enclosed the front of the machine was removed exposing the engine and a drive pulley system which delivered power from the engine to the drive pulley by a clutch and belt mechanism. Two youths lifted the rear of the unit and a third "revved" the engine. The spinning clutch spring unwound from the cam and shaft and flayed the inside of a partial guard which enclosed the pulleys. Plaintiff Wolfgram, who was observing the operation, was struck by a projectile propelled by this flaying. He was blinded in one eye. Wolfgram initiated a diversity action upon theories of negligent design and breach of implied warranty which resulted in a jury verdict of no cause of action. This appeal ensued.

Invoking the applicable Michigan law enunciated in Smith v. E. R. Squibb & Sons, 273 N.W. 2d 476 (1979), Wolfgram attempted to prove that the risk of injury from the propelled broken part was unreasonable and foreseeable since the defendant should have known that normal obsolescence could result in disintegrating

parts. In conjunction with this theory of proof, plaintiff avers that the following instruction given by the trial court was tantamount to a directed verdict in favor of the manufacturer:

> The defendant manufacturer is not under a duty to provide replacement of worn parts nor is it under a duty to guard against wear and deterioration of parts.

The clear import of this instruction is that a manufacturer is not under a duty to prevent ("guard against") normal obsolescence and deterioration of parts, a correct statement of Michigan law. Wolfgram, however, conjectures that the instruction infers that a manufacturer is not under a duty to install a guard or to guard against or prevent injury from fatigued parts if the risk of injury is unreasonable and the wear and deterioration of the parts is foreseeable. This Court rejects plaintiff's unsupported interpretation of this instruction.

Wolfgram further alleges that the appellate record fails to reflect the complete charge given by the Court which, in its entirety, reads:

> The defendant manufacturer is not under a duty to provide replacement of worn parts nor is it under a duty to guard against injury resulting from wear and deterioration of parts. (emphasis added)

Assuming, arguendo, that plaintiff's interpretation of the charge is correct and that the transcript is in error, the impact of such instruction must be examined within the context of the jury instructions in their entirety and viewed as a whole. As this Court has stated:

> In considering the correctness and adequacy of a charge to the jury, it should be taken as a whole and read in its entirety; that is, each instruction must be considered in connection with others of the series referring to the same subject and connected therewith, and if, when taken together, they properly express the law as applicable to the particular case, there is no just ground of complaint, even though an isolated and detached clause is in itself inaccurate, ambiguous, incomplete, or otherwise subject to criticism.

Gradsky v. Sperry Rand Corp., 489 F.2d 502, 504 (6th Cir. 1973) citing 53 Am.Jr. Trial-Section 842. See also: Nolan v. Green, 383 F.2d 814 (6th Cir. 1967); Waxler v. Waxler Towing Co., 342

F.2d 746 (6th Cir. 1965); Tyree v. New York Central R. R., 382 F.2d 524, 527 (6th Cir.), cert. denied, 389 U.S. 1014 (1967). Viewed thusly, any error in the instruction fails to render the verdict "inconsistent with substantial justice", a mandate of Rule 61, Fed. R. Civ. P., for setting aside a verdict. The instructions as a whole properly and fully charged the elements of and defenses to the causes of action upon which the litigation was predicated. In particular, the instructions taken as a whole charged upon the duty of a manufacturer to use reasonable care to design a product so as to render it safe for its intended and reasonably anticipated use. Further, the jury was specifically instructed "not to single out any one instruction alone stated in the law, but [to] consider the instruction as a whole." It is presumed that this jury followed this instruction as it was given. Tucker v. Bethlehem Steel Corp., 445 F.2d 390 (5th Cir. 1971); Pittman v. Littlefield, 438 F.2d 659, 662 (1st Cir. 1971); Lifetime Siding, Inc. v. United States, 359 F.2d

657, 661 (2d Cir.), cert. denied, 385 U.S. 921 (1966). In sum, the verdict may not be set aside as predicated upon either the charge as it appears in the appellate record or as contended by Wolfgram.

Wolfgram's second assignment of error charges that the trial judge improperly refused to instruct the jury that contributory negligence as a defense was not available to the manufacturer against plaintiff's cause of action founded upon the manufacturer's alleged negligence in designing or manufacturing a product with inadequate safety features. Plaintiff relies upon several authorities in support of the proposition that such a charge is mandated upon request. Tulkku v. Mackworth Rees, 406 Mich. 615, 281 N.W.2d 291 (1975); Timmerman v. Universal Corrugated Box Machinery Corp., 93 Mich. App. 680, 287 N.W.2d 316 (1979); Vincent v. Allen Bradley Co, 95 Mich. App. 426, 291 N.W.2d 66 (1980). This argument is without merit since the affirmative defense of contributory negligence was not pursued by defendant at trial

and thus never became an issue warranting an instruction. Accordingly, no charge was required even if the requested instruction constituted a correct statement of the law. As this Court has aptly stated,

> Instructions are to be considered as a whole and where they fairly and adequately cover material issues, it is not error to refuse to give requested instructions, even though they correctly state the law. Bridger v. Union Railway Company, 355 F.2d 382 (6th Cir. 1966); Codd v. Union Railway Company, 318 F.2d 33 (6th Cir. 1963), cert. denied, 375 U.S. 945, 84 S.Ct. 352, 11 L.Ed.2d 275; United States Fidelity and Guaranty Company v. Canale, 257 F.2d 138 (6th Cir. 1958).

Carruba v. Transit Casualty Company, 443 F.2d 260, 264 (6th Cir. 1971).

It is apparent from the special verdict returned by the jury that it would not have been required to address any issue of contributory negligence even if such issue would have been properly before it during its deliberations. Interrogatory #1 of the special verdict form, which reads as follows,

> 1. Do you find that the defendant Bombardier was negligent, and

> that the negligence was a proximate cause of the accident, all as explained in these instructions?

was answered "No" by the jury. Obvious from the negative answer, the jury determined that either the manufacturer was not negligent or, that if it was negligent, such negligence was not the proximate cause of the plaintiff's injury.

Similarly, the jury's negative answer to Interrogatory #2, which reads as follows,

> 2. Do you find the defendant Bombardier breached an implied warranty that was a proximate cause of the accident, as is explained in these instructions?

indicated that the jury absolved the defendant of any breach of implied warranty or refused to conclude that a breach of implied warranty, if in fact it existed, was the proximate cause of plaintiff's injuries. Accordingly, the jury was not required to address any issue of contributory negligence even if such issue would have been material. Simply, any error predicated upon instructions addressing an issue which is immaterial in the light of the jury's verdict

must be deemed harmless. See, 11 Wright & Miller, Civil §2885 at 290-91, n.71 (numerous citations).

Wolfgram's third assignment of error charges that the trial court erroneously admitted expert testimony by Dr. Ralph Barnett (Barnett) which addressed the design of the guard and exceeded the scope of his pre-trial written report which, Wolfgram alleges , addressed only use and misuse of the machine. Examination of the written report reveals that the adequacy of the guard was within the ambit of Barnett's report which stated at Paragraph 13:

> 13. An examination of the original guard on a duplicate machine indicates that there is really no escape geometry when the guard is in place.

The trial court clearly did not abuse its discretion in allowing such testimony over the objections of Wolfgram.

Wolfgram further charges that the trial court's refusal to permit plaintiff to read to the jury excerpts from a document entitled "Principles and Techniques of Mechanical

Guarding", published by the United States Department of Labor, Occupational Safety and Health Administration (OSHA publication), which was offered into evidence under the learned treatise exception to the hearsay rule, Rule 803(18), constituted error. While the basis of the trial court's exclusion is unclear, the relevance and admissibility of the publication was questionable since it had been revised antecedent to the manufacture of the snowmobile in issue and was not probative since its applicability appeared to be limited to industrial machinery rather than consumer products. As such, this Court cannot conclude that the trial court abused its Rule 403 discretion. The authority cited by Woltgram, Johnson v. William C. Ellis & Sons Iron Works, Inc., 604 F.2d 950 (5th Cir. 1979), is inapposite since therein many pamphlets were excluded and other improper evidentiary proceedings and jury instructions mandated a reversal. In this case, not only was the exclusion proper, but even if the exclusion had been improper it would not have

constituted prejudicial error since a "substantial right of the party [was not] affected." Rule 103, Fed. R. Evid.

Lastly, Wolfgram predicates error upon the trial court's admission into evidence of (1) an operator's manual which contained warnings and safety precautions and (2) reproductions of two decals, one affixed under the cowling and the other upon the belt guard, each of which stated "Engine should not be running without this guard in place." Admission of the decals was proper since the jury could have determined that Wolfgram had been exposed to the same. Admission of the owner's manual, contrawise, was error since Bombardier failed to establish that Wolfgram had been or could have been exposed to said warnings. Rule 402, Fed. R. Evid. The prejudice, if any, however, was mitigated by the following jury instruction which permitted the jury to consider such warnings only to the extent that they "gave notice":

> You may consider evidence presented showing that before the event in which injury occurred, pamphlets, booklets, labels or

> other written warnings were provided which gave notice to foreseeable users of the material risk of injury, death, or dangerous connection with the foreseeable use of the product or provided instructions as to the foreseeable use or application or limitations of the product which the defendant knew or should have known.

Admission of the owner's manual fails to affect a "substantial right" warranting reversal. Rule 103, Fed. R. Evid.; Rule 61, Fed. R. Civ. P.

In light of the jury's verdict, this Court need not address the refusal of the trial court to permit plaintiff to proffer during closing arguments that an "adequate award" should be provided so as to "deter future conduct".

In accordance with the foregoing, the judgment of the district court is hereby AFFIRMED.

ENTERED BY ORDER OF THE COURT

/S/JOHN P. HEHMAN, Clerk

No. 81-1117

Gerald B. Woltgram v. Bombardier Ltd.

JONES, Circuit Judge, dissenting.

I dissent from the holding of the majority that no reversible error occurred in failing to instruct the jury not to consider plaintiff's contributory fault.

The majority initially finds that contributory negligence "was not pursued at trial and thus never became an issue warranting an instruction." I disagree. The contributory negligence issue was presented in several ways during the course of the trial. The defendant pursued the issue of whether plaintiff, then under legal age, had been drinking beer on the evening of the accident. Also, the defendant's theory of the case, read to the jury, emphasized the hard use to which the snowmobile was subjected, neglect of maintenance, and plaintiff's own proximity to the machine as its rear end was lifted and it was revved to its maximum capacity. Furthermore, the jury was made

aware of defendant's interrogatory answer asserting reliance upon contributory negligence.

The district court's refusal to instruct that contributory negligence must not be considered was in part due to fear of confusing the jury. This sentiment was misplaced. Here, there was substantial evidence raising the specter of contributory negligence. Contrary to the view of the court below, such evidence could confuse the jury into thinking that plaintiff's negligence was a relevant consideration in determining whether defendant was negligent or breached an implied warranty. A proper instruction was vitally necessary.

Both the courts of Michigan and this Circuit deem fundamental an instruction that the issue of contributory negligence is not to be considered, when such an instruction is supported by the substantive law. Design defect claims in Michigan are not defeated by plaintiff's contributory negligence whether brought under negligence law, Tullku v. Mackworth Rees, 406 Mich. 615, 281 N.W.2d 291 (1979) or the law of

implied warranty. Timmerman v. Universal Corrugated Box Machinery Corp., 93 Mich. App. 680, 287 N.W.2d 316 91980). See Kujawski v. Conen, 83 Mich. App. 239, 268 N.W. 2d 358 (1978) (consumer use of motor vehicle). Thus, in Timmerman, the court found error in refusing a request to instruct that contributory negligence is not a defense to an implied warranty count. 93 Mich. App. at 684, 287 N.W.2d at 318. In Dixon v. Penn Central Co., 481 F.2d 833 (6th Cir. 1973), an FELA case, this Court held that plaintiff's request for an instruction eliminating contributory negligence from the jury's consideration should have been granted. Id. at 837.

The majority cites the jury's failure to find negligence or breach of implied warranty as conclusive evidence that the failure to instruct was harmless. In this case the jury was not properly instructed as to what evidence it could and could not consider in determining these questions. It is true that as a theoretical matter, the jury must consider and find

defendant's breach of duty or implied warranty in isolation before the issue of plaintiff's contributory negligence even arises. But, as the Supreme Court explained in a different context, a party is entitled to an instruction "in this context or any other--precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory." Keeble v. United States, 412 U.S. 205, 212 (1973) (lesser included offense instruction).

In my view, the majority errs in conclusively presuming that the jury properly separated out the subject of contributory negligence and thereafter excluded it from its deliberations even though no instruction was given to set the jury on such a course. Keeble stands against that unwarranted conclusion.

Were this situation covered by the Michigan Standard Jury Instructions, failure to give the requested instruction would mandate automatic reversal, even if the issue were raised only by plaintiff. Socha v. Passino, 405 Mich. 458, 275 N.W.2d 243 (1979); see generally I.

Michigan Standard Jury Instruction 11.02 (2d ed. 1981). Although the instruction was not embodied in the Michigan Standard Jury Instructions, the Timmerman case demonstrates the common law right of plaintiffs to an instruction that contributory negligence is not to be considered.

To avoid the perception that federal court is a refuge from the advancing law of products liability in Michigan, we ought to be especially careful to accord injured plaintiffs their full measure of substantive and procedural protection. In my view, by failing to do so, the majority both mandates an incorrect result in this case and fosters the broader insidious perception. Accordingly, I must dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

GERALD B. WOLFGRAM, et al, Plaintiffs, vs BOMBARDIER LIMITED, Defendant.	)	CIVIL ACTION NO. 79-10155

MEMORANDUM OPINION AND ORDER

At a session of said court, held in the Federal Building, Bay City, Michigan on February 3, 1981

PRESENT: HONORABLE JAMES HARVEY
United States District Judge

This Court referred the above-entitled matter to U.S. Magistrate Harvey D. Walker pursuant to the stipulation and consent of the parties.

The Magistrate presided over the trial and recommended to this Court that judgment be entered in accordance with the jury verdict of no cause of action which was rendered on August 26, 1980. This Court entered judgment in accordance with the recommendation on September 19, 1980.

On September 24, 1980, plaintiffs filed a motion for new trial which the Magistrate duly considered. On November 25, 1980, the Magistrate issued a memorandum opinion and recommendation that plaintiff's motion be denied. Plaintiffs filed objections to the Magistrate's recommendation on December 11, 1980 which are untimely under 28 USC 636(b) (1)(B). Thus, this Court is not obligated to review the portions of the Magistrate's recommendation objected to. Park Motor Mart Inc. v Ford Motor Company, 616 F2d 603 (CA 1, 1980).

The Court, however, has reviewed plaintiffs' objections and finds that the Magistrate's opinion correctly disposes of the issues which plaintiffs have raised in regard to plaintiffs' objections to the two jury instructions given, 23A and 30A-1, and with regard to the Magistrate's refusal to instruct the jury that contributory negligence was not a defense.

Accordingly, the Court hereby ADOPTS the Magistrate's opinion IN FULL as its own.

Plaintiffs' motion for a new trial therefore, is DENIED and IT IS ORDERED that this file be closed as final judgment has been entered.

IT IS SO ORDERED.

/s/ JAMES HARVEY

United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

GERALD B. WOLFGRAM, Next Friend for DANIEL WOLFGRAM, FAYE I. WOLFGRAM, and GERALD B. WOLFGRAM, Jointly and Severally, Plaintiffs,	CIVIL ACTION No. 79-10155-NP
vs	
BOMBARDIER LIMITED, Defendant.	

MEMORANDUM OPINION AND RECOMMENDATION

This action is before this Court upon Plaintiffs' Motion for New Trial. This Court tried this action and recommended to the United States District Court that judgment be entered in accordance with the jury verdict of no cause of action which was rendered on August 26, 1980, and Judgment was entered by the United States District Court on September 19, 1980, in accordance with the recommendation. The Plaintiff, in his Motion, has set forth two grounds in support of the Motion for New Trial. Those two grounds are as follows:

1. Did the Court commit prejudicial

error to Plaintiff in giving the Jury Instructions No. 23A and 30A-1.

2. Was it error for the trial court to refuse to instruct the jury that contributory negligence was not a defense.

The Court will now speak to the above issues taking into consideration Plaintiffs' Brief in Support of the Motion and Defendant's Answer thereto.

The Plaintiff in his Brief in Support of Motion for New Trial fails to treat with the matter of giving Jury Instruction No. 23A. Therefore, the Court will not consider that claim in deciding the motion.

ISSUE I

Plaintiff does treat at length with the claimed error in giving charge number 30A-1. Actually, the language in question is the last paragraph of the Court's charge number 30A-1. Taken alone the paragraph objected to might raise some question as to its effect on the jury. However, when read with the preceding two

paragraphs - it becomes apparent that the subject was properly treated with in light of the testimony as to the condition and use of the snowmobile at the time of the accident. The entire charge on design and manufacture is set out at this point with the paragraph objected to underlined:

> "It is the duty of a manufacturer to use reasonable care under the circumstances to design his product. However, he has no duty to make it accident-proof or foolproof, but it must be reasonably fit for the use for which it is intended. This duty includes the duty to design the product so it will fairly meet any use which can be reasonably anticipated. This is not to say that a manufacturer warrants that his product is, from a design standpoint, incapable of producing injury but rather is reasonably safe for use as intended or reasonably anticipated.
>
> If you find that defendant used reasonable care under the

circumstances so as to design and manufacturer its product, and component parts, to be fit for the uses reasonably intended or reasonably anticipated, then you will further find that there was no negligence on the part of the defendant in the design of its product. If you find, however, that the defendant did not use reasonable care under the circumstances in the design of its product, then you will determine whether or not this failure to use reasonable care was a proximate cause of the plaintiff's injuries and damages.

The defendant manufacturer is not under a duty to provide replacement of worn parts nor is it under a duty to guard against injury resulting from wear and deterioration of parts. Likewise, the law does not impose a duty upon the manufacturer to supply materials that will not wear out, and the manufacturer does not have to anticipate that maintenance will be neglected."

The jury cannot be presumed to grasp and hold to one small portion of the charges given in arriving at a verdict. As was said in First National Bank of Henrietta v Small Business Administration, 429 F 2d 280, 285 (5th Cir 1970)

> "Instructions are required to be considered by a jury as a unit. Frequently, what is included in one respect will completely eliminate or modify the need for desirability of other previously requested instructions."

Given, as here, with other related instructions, there is nothing prejudicial in the whole instruction to the Plaintiff.

The evidence contained numerous references to the age and use of the machine in question. There was also testimony as to the degree of repair and maintenance that the machine had experienced. That such conditions could have been a, or, the proximate cause of the Plaintiffs' injuries was something left to the jury to determine.

The case of Kaczmarek v Mesta Machine, 463 F 2d 675, 678 (3rd Cir 1972) is cited in Defendant's brief in opposition to Plaintiffs'

motion as cited in Mitchell v Ford Motor Co, 533 F 2d 19 (1st Cir 1976) and at page 20 the Court states:

> "To come to specifics, the manufacturer is not under a duty to supply materials that will not wear out. McLaughlin v Sears, Roebuck & Co., 1971, 111 N.H. 265, 268; 281 A. 2d 587, 589. There the court said,
>
> > 'The duty of the manufacturer or supplier is limited to foreseeing the probable results of the normal use of the product or a use that can reasonably be anticipated. Prosser, Torts 667 (3d ed. 1964); ... Clearly there is no duty to furnish a product that will not wear out.'"

Unfortunately, the cases in the State of Michigan do not treat directly with the nature or extent of the duty of the manufacturer in products liability cases as to the matter of natural wear and deterioration. There is precedent in Michigan that, if requested, a charge be given in a products liability case that a manufacturer is under no duty to provide an accident-proof or foolproof machine. Casey v Gifford Wood Co, 61 Mich App 208 (1975). See also Robertson v Swindell-Dressler Co, 82 Mich App

382, 395 (1978). This Court further cites Murphy v Easton, Yale & Towne, Inc, 444 F 2d 317 (6th Cir 1971), where the Sixth Circuit Court of Appeals, applying Michigan law, stated:

> "Camp v Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950), was cited with approval by the Supreme Court of Michigan in Fisher. In Campo the highest court in New York stated:
>
> > 'If the manufacturer does everything necessary to make the machine function properly for the purpose for which it is designed, if the machine is without any latent defect, and if its functioning creates no danger or peril that is not known to the user, then the manufacturer has satisfied the law's demands. We have not yet reached the state where a manufacturer is under the duty of making a machine accident proof or foolproof. Just as the manufacturer is under no obligation, in order to guard against injury resulting from deterioration, to furnish a machine that will not wear out * * *, so he is under no duty to guard against injury from a patent peril or from a source manifestly dangerous. * * * In other words, the manufacturer is under no duty to render a machine or other article 'more' safe - as long as the danger to be avoided is obvious and patent to all.'"

On the other hand Plaintiffs rely on

Tulkku v Mackworth Rees, 406 Mich 615, and Timmerman v University Box Co, 93 Mich App 680, to support its claim of error. These cases, however, relate to lack of or failure of safety devices in industrial use but seem to recognize that the employee/plaintiff who is bound to work with what his employer provides is hardly in the position of one such as the Plaintiff here who was not impelled to work with the snowmobile or for that matter to be nearby. Furthermore, the shielding provided by the Defendant in this case was hardly in the category of the safety devices involved in those two cases.

Therefore, in light of the case law, this Court finds that no prejudicial error was committed in giving Jury Instruction 30A-1 and accordingly this Court does hereby respectfully recommend to the United States District Court to enter an order DENYING Plaintiffs' Motion for New Trial brought pursuant to F R Civ P 59(a).

ISSUE II

Although there was agreement that contributory negligence was not a defense in this

case at the commencement of trial based on the claim of breach of implied warranty and statements of claim as well as Defendant's opening statement and oral argument of both did not relate to contributory negligence, Plaintiffs apparently claim that Defendant's Affirmative Defense which plead contributory negligence should have somehow been stricken. At no time were the pleadings in question ever presented to the jury or made a part of the record. In his opening statement, no reference was made to the defense of contributory negligence by the Defendant. However, alleging that he was induced by the Defendant to do so by the condition of the pleadings, Plaintiff claims he did comment in his opening statement on contributory negligence. If he did this, it was the first, last and only time that the jury heard of contributory negligence. Surely over the period of 5 days of trial it was reasonable for the Court to assume that the matter of contributory negligence had long since been buried and forgotten.

Plaintiffs complain that reference by

defense counsel in its statement of claim to hard use of the machine, to bent or broken parts and to lack of maintenance as well as to the conduct of the group at the scene generally was an effort to establish the existence of contributory negligence in the minds of the jury. What he overlooks is the fact that proximate cause was an important issue in the case. Was defective design and manufacturer the proximate cause or on the other hand, was unforeseen careless use and abuse of the product the proximate cause. To hold that Defendant either abandon proofs of such unforeseen circumstances or on the other hand agree to the charge regarding contributory negligence sought by the Plaintiffs would have been to have imposed the theory of absolute liability on the Defendant. This theory of liability has not been recognized in Michigan law.

This Court must assume that the members of the jury were true to their oath and did not consider, in following the Court's instructions, the elements of contributory negligence or

comparative negligence. See Pittman v Littlefield, 438 F 2d 659 (1st Cir 1971).

It is the function and duty of the trial court to instruct the jury as to the law and it is the duty of the jury to accept it. Glendenning Motor Ways v Anderson, 213 F 2d 43 (8th Cir 1954).

The Sixth Circuit Court of Appeals stated in the Murphy case, supra: "In order to direct a verdict on the count of implied warranty the District Judge held as a matter of law that the forklift truck was defective and that there was a causal relationsnip between the defect and plaintiff's injuries. He relied on Piercefield v Remington Arms Co, 375 Mich 85, 133 N.W. 2d 129 (1965), and held that the defenses of assumption of risk, contributory negligence, and misuse of the product by the plaintiff, were not available to Eaton. Eaton was even deprived of the defense that the conduct of the plaintiff, whether denominated as contributory negligence, sole negligence, assumption of risk or misuse of the truck intervened to proximately cause the injuries which he sustained.

[2] In our judgment, this imposed upon Eaton the absolute liability of an insurer, which is not the law of Michigan. Fishers v Johnson Milk Co., 383 Mich. 158, 174 N.W. 2d 752, (1970); Barefield

v LaSalle Coca-Cola Co., 370 Mich. 1, 120 N.W. 2d 786, (1963)."

Plaintiffs contend that if a Standard Jury Instruction is requested and not given that reversible error will occur. He then sets out Standard Jury Instruction 11.02 - "You must not consider whether contributory negligence on part of the plaintiff -- because --" and cites Javis v Ypsilanti Board of Education, 393 Mich 689, (1975) and Socna v Passeno, 405 Mich 458, (1979) to establish that it is mandatory that that instruction be given. The requested charge as set out on page 8 of Plaintiffs' brief bears little or no resemblance to the Standard Jury Instruction 11.02. The requested charge was long and involved and in a number of respects misstated the law in Michigan. The Standard Jury Instruction was not proffered. Although the Javis case seemed to go far toward mandating giving of Standard Jury Instructions the later case, Socna v Passeno state at page 467:

> "We do not believe Javis totally constrains discretion of trial judges. The judge's discretion is still required in determining whether or not the instruction is

> applicable and whether the instruction accurately states the law."

After a lengthy discussion of the instruction with counsel at the close of proofs the Court concluded that to open up the subject of contributory negligence would be to confuse rather than enlighten the jury in proceeding with its deliberations. Inasmuch as neither Defendant's statement of claim nor arguments of both counsel related to contributory negligence and the proofs were barren of clear evidence of negligence by the Plaintiffs the Court refused to instruct that the jury might consider whether there was negligence on the part of the Plaintiffs, in view of the claim of breach of implied warranty and despite the Plaintiffs' count in negligence. All of this, therefore, appears to be plainly a matter of the limited discretion of the Court. Failure to give the charge as requested by the Plaintiffs did not rise to that prejudice which would amount to reversible error.

Therefore, for the above cited reasons,

this Court finds that no reversible error was committed by this Court for refusal to instruct the jury that contributory negligence was not a defense. Accordingly, it is respectfully recommended that an order issue denying Plaintiffs' Motion for New Trial brought pursuant to F R Civ P 59(a).

/s/ HARVEY D. WALKER
United States Magistrate

Dated: November 24, 1980.

INSTRUCTION 30A-1

The defendant manufacturer is not under a duty, to provide replacement of worn parts nor is it under a duty to guard against injury resulting from wear and deterioration of parts. Likewise, the law does not impose a duty upon the manufacturer to supply materials that will not wear out, and the manufacturer does not have to anticipate that maintenance will be neglected.

If you find, however, the Defendant did not use reasonable care under the circumstances in the design of its product, then you will determine whether or not this failure to use reasonable care was a proximate cause of the Plaintiff's injuries and damages. The Defendant manufacturer is not under a duty to provide replacement of worn parts, nor is it under a duty to guard against wear and deterioration of parts.

Likewise, the law does not impose a duty upon the manufacturer to supply materials that will not wear off. The manufacturer does not know that maintenance will be neglected.

When considering whether the Defendant is liable to Plaintiff, you may consider any evidence presented that shows or tends to show that the cause of the injury to Plaintiff was an alteration or modification of the product, in the safety device area or its application or use made by a person other than the Defendant, and without specific direction from the Defendant, which was

the sole cause of Plaintiff's injuries.

TRIAL TRANSCRIPT - PAGES 815 - 818

MR. SUMPTER: Your Honor, Plaintiffs submitted a supplemental instruction which was basically taken from the case of Tulkku versus Mackworth Rees, 406 Michigan 615 at page 619. That instruction in that case presented to the Court was modified somewhat to fit the aspect of this case. During our in-Chambers discussion of instructions, the Court refused to give that instruction, so I would say to the Court I'd like to voice my objection that that instruction should have been given in its entirety.

Specifically, the instruction relates to the contributory negligence of the Plaintiff or any other person, and the Court has ruled that contributory negligence is no defense and, accordingly, not instructed to the jury.

However, contributory negligence was mentioned in opening statement, and the Defendant has very regularly injected the issue of contributory negligence throughout the entire trial. It is such common knowledge in Michigan,

historically, that contributory negligence is, indeed, to be taken into consideration, that I think it appropriate for the Court to specifically advise to the contrary on that issue.

THE COURT: Well, let's stop there. You feel there was not an affirmative warning that contributory negligence wasn't a defense?

MR. SUMPTER: Yes. I feel that the jury should be specifically advised that contributory negligence is not a defense in this case.

MR. DOYLE: For the record, Your Honor, I will repeat briefly what we said in Chambers, and that is that the Court having decided that the defense of contributory negligence would not be instructed upon, as it was not an issue in this case. I deem it inappropriate for this instruction to have been given, and I think the Court was correct in declining to give it.

It would just over -- unduly overemphasize a matter which was raised only by the Plaintiff in his opening statement, and was not mentioned by the Defendant, and nowhere else

was it mentioned in the instructions.

The jury is sworn to follow the law they are given. They are given the law this Court has stated applies and to tell them that a certain portion of the body of law does not apply, it seems to me is a redundance in nearly a -- overemphasizing on something that needs not be emphasized at all.

On the second part of the instruction -- are we going to do it in two parts?

THE COURT: The second part was that last paragraph.

MR. DOYLE: Had you addressed yourself to that already, Mr. Sumpter?

MR. SUMPTER: I was referring to the whole case. I think the Court instructed on the last paragraph.

THE COURT: I thought we did instruct on that.

MR. SUMPTER: I was only referring to the contributory negligence aspect.

MR. COURT: Well, I see your point, but I really am inclined to feel now that the Court

ruled that contributory negligence is not a defense and has so instructed. That is, in other words, has not mentioned that defense, that to inject it it is to do kind of a double negative here and would only, perhaps, serve to confuse the jury. But your objection is noted.